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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JULIO CESAR JACUINDE,<br>Defendant and Appellant. | E069537<br>(Super.Ct.No. RIF1603431)<br>OPINION |

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Michael Pulos, Kathryn

Kirschbaum, Seth M. Friedman, and Nora S. Weyl, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant and appellant, Julio Cesar Jacuinde, was tried by jury and convicted of attempted carjacking with great bodily injury and weapon use enhancements. (Pen. Code §§ 664, 215, subd. (a), 12022, subd. (b)(1), 1192.7, subd. (c)(23).)[1] In a subsequent bifurcated court trial the court found defendant had a prior serious felony conviction and strike. Defendant was sentenced to a total of 18 years, which included a mandatory five-year term for the prior serious felony conviction. Defendant appealed.

On appeal, defendant argues there was insufficient evidence to support a finding that he formed the specific intent necessary to prove the carjacking conviction. Defendant also submitted supplemental briefing arguing that the case must be remanded to permit the trial court to take into account a change in the law which made imposition of the five-year term for a prior serious felony conviction discretionary. We affirm the judgment and remand for resentencing.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Around midnight on April 11, 2016, Lorenzo W. was in his second story apartment in Riverside with his girlfriend Emma S. At the time, Lorenzo W. owned two cars: a Honda and a Mercedes. Both Lorenzo W. and Emma S. were in the living room when Lorenzo W. heard his Honda start. Lorenzo W. went to the window of his

[1] All further statutory references are to the Penal Code.

apartment, which had a view of the Honda. Lorenzo W. saw the Honda move a little, saw his brake lights turn on, and noticed someone inside. The Honda was on when he first saw it, but turned off shortly after. He told Emma S. that someone was trying to steal his Honda.

Lorenzo W. put on pants while Emma S. went downstairs to confront the person in the Honda. She and Lorenzo W. both later identified defendant as the person in the Honda. About halfway down the stairs, Emma S. began yelling at defendant, telling him to leave and "[j]ust get out." She also threatened to call the police. According to Emma S., at this point she "looked at [defendant's] face, and I noticed that he was not going to leave. He was going to fight it. And he was going to take the car."

Lorenzo W. came downstairs after Emma S. Defendant's entire body was still in the Honda, but the door was open. Lorenzo W. approached the Honda and grabbed defendant by his shoulders. As Lorenzo W. tried to pull defendant out of the Honda by his shoulders, defendant jumped out of the Honda and slashed Lorenzo W. across his stomach with a concealed knife. Defendant did this in one fluid movement. Lorenzo W. backed up and dropped the keys to his Mercedes, which defendant immediately picked up.

Despite the injury, Lorenzo W. approached defendant, telling him "'[y]ou're not going nowhere with my keys.'" Defendant began to back away from Lorenzo W. with the knife in his right hand and a screwdriver in his left. While backing up, defendant told Lorenzo W. that he would drop the keys. Defendant did not drop them fast enough for

Lorenzo W., who continued to approach defendant. In the meantime, Emma S. ran upstairs and called 911. Lorenzo W. and defendant then got into a scuffle near a neighbor's garage. During this scuffle, defendant cut Lorenzo W. at least two more times and dropped the keys to the Mercedes.

Lorenzo W. picked up his keys but continued to move towards defendant while defendant moved back. At some point, defendant dropped both his screwdriver and hat. Lorenzo W. pursued defendant to a corner on a dark road before turning around and going home. Lorenzo W. returned to the driveway outside his apartment, where police were waiting. Lorenzo W. spoke to police before an ambulance took him to receive treatment.

Police found a shaved key used to access and start the Honda and the hat defendant dropped. Defendant's DNA was on the shaved key and on the hat.

Defendant was tried for three counts: attempted second degree murder (§§ 664, 187, subd. (a), 189, subd. (b); count 1), attempted carjacking (§§ 664, 215, subd. (a); count 2), and assault with a deadly weapon (§ 245, subd. (a)(1); count 3). All counts included allegations that defendant inflicted great bodily harm (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)), and counts 1 and 2 included allegations that defendant used a deadly weapon (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)). After trial, the jury found defendant guilty on count 2, not guilty on count 1, and failed to reach a verdict as to count 3. It further found the great bodily injury and weapon enhancements true as to

count 2. In a court trial following the jury trial, the court found defendant had a prior serious felony conviction and strike.

The trial court denied probation and imposed the upper term of nine years, which consisted of four and one-half years for the attempted carjacking doubled due to the strike. The court also sentenced defendant to one year for the weapon enhancement (§ 12022, subd. (b)(1)), three years for the great bodily injury enhancement (§ 12022.7, subd. (a)), and five years for the prior serious felony conviction (§ 667, subd. (a)). It also sentenced defendant to one year for a prior prison term enhancement, but stayed the one-year term. (§ 667.5, subd. (b).) Defendant's sentence totaled 18 years.[2] After sentencing, the prosecution dismissed count 3.

Defendant timely filed his notice of appeal on November 17, 2017. (Cal. Rules of Court, rule 8.308.)

## III. DISCUSSION

Defendant argues there is insufficient evidence that defendant had the specific intent to take, retain or regain possession of the Honda when he used force against Lorenzo W. In a supplemental brief, defendant also argues that we should remand this

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[2] The trial court stated on the record that each enhancement would be served "concurrently." However, it concluded that the total aggregate sentence was "18 years in state prison," which would only be possible if the enhancements were to be served consecutively. The minute order and abstract of judgment confirm that the total sentence was 18 years, and the minute order explicitly notes that each enhancement is to be served consecutively, not concurrently. Because concurrent imposition of terms for these enhancements would be unauthorized (see §§ 12022, subd. (b)(1) [requiring imposition of additional and consecutive one-year term], 12022.7, subd. (a) [requiring imposition of additional and consecutive three-year term], 667, subd. (a)(1) [requiring that each enhancement run consecutively]), we consider the reference to be an oversight.

case for resentencing so that the trial court can exercise its discretion to strike or impose the enhancement for the serious felony conviction (§ 667, subd. (a)(1)) in light of new sentencing laws. We find that there was substantial evidence to support defendant's conviction, but that remand for resentencing is appropriate

A. *Substantial Evidence Exists to Support Defendant's Conviction*

Defendant argues there is insufficient evidence to support the conviction for attempted carjacking because the evidence showed he only used force to make his escape, not to steal the car. We disagree.

When reviewing a sufficiency of the evidence claim, an appellate court determines whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Smith* (2005) 37 Cal.4th 733, 738-739; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) In doing so, we view the evidence in a light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence which supports the judgment. (*People v. Johnson*, *supra*, at p. 576, citing *People v. Mosher* (1969) 1 Cal.3d 379, 395.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) "We resolve all evidentiary conflicts and questions of credibility 'in favor of the verdict . . . .'" (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014, quoting *People v. Cardenas* (2015) 239 Cal.App.4th 220, 226-227.)

"Substantial evidence must be of ponderable legal significance, reasonable in nature, credible and of solid value." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 585.) "'The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable.'" (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1018.)

"The standard of review is the same in cases in which the People rely mainly on circumstantial evidence." (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Circumstantial evidence may be sufficient on its own to prove guilt beyond a reasonable doubt. (*Id.* at p. 793.) Just because the circumstances may also reasonably support a different conclusion than the one drawn by the trier of fact does not warrant reversing the judgment. (*Ibid.*)

To prove a violation of section 215, the prosecution must show that (1) the defendant took a motor vehicle that was not his, (2) he took it from the immediate presence of a possessor or passenger, (3) the taking was against that person's will, (4) the defendant used force or fear to effectuate the taking, and (5) when the defendant used force or fear he intended to deprive the other person of the vehicle. (CALCRIM No. 1650; § 215.) Carjacking is directly analogous to robbery; indeed, "'the carjacking statute's language and legislative history . . . demonstrate that carjacking is a direct offshoot of robbery and that the Legislature modeled the carjacking statute on the robbery statute.'" (*People v. Lopez* (2017) 8 Cal.App.5th 1230, 1234, quoting *People v. Lopez* (2003) 31 Cal.4th 1051, 1059.) To satisfy the asportation requirement for robbery, "'no great movement is required, and it is not necessary that the property be taken out of the

physical presence of the victim.'" (*People v. Mason* (2006) 140 Cal.App.4th 1190, 1200.)

The specific intent for a carjacking is almost identical to the specific intent for robbery "with two exceptions: (1) carjackings require an intent to either temporarily *or* permanently deprive the owner of the property . . . , and (2) carjackings only involve vehicles whereas robbery may involve any type of property." (*People v. Vargas* (2002) 96 Cal.App.4th 456, 462, italics added.) This intent must be present at the same time as the defendant's use of force. (CALCRIM No. 1650; *People v. Davis* (2005) 36 Cal.4th 510, 562.) "If the defendant does not harbor the intent to take property . . . at the time he applies force or fear, the taking is only a theft, not a robbery." (*People v. Davis*, *supra*, at p. 562.)

However, "[i]n California, '[t]he crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of relative safety.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994, quoting *People v. Estes* (1983) 147 Cal.App.3d 23, 28.) Thus, it "is robbery when the property was peacefully acquired, but force or fear was used to carry it away." (*People v. Anderson*, *supra*, at p. 994.) "The same principle applies in the carjacking context." (*People v. Hudson* (2017) 11 Cal.App.5th 831, 838.) Further, a carjacking occurs within the meaning of section 215, subdivision (a) when a thief gains possession of an unoccupied car and then unlawfully retains possession through force or fear. (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1131.) The *Estes* rule thus applies to the crime of carjacking.

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) The ineffectual act "must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime." (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

With regards to carjacking, such an attempt may be made if the defendant gains access to or control of the vehicle, and meets all the other elements of the crime, but is unable to move the vehicle. (*See People v. Vargas*, *supra*, 96 Cal.App.4th at p. 463.) Respecting the defendant's intent, it may be inferred from circumstances and was a question of fact for the jury to decide. (*People v. Deleon* (1982) 138 Cal.App.3d 602, 606, citing *People v. Hall* (1967) 253 Cal.App.2d 1051, 1054.) Intent may be inferred where a defendant takes car keys from a victim, even if the defendant fails to take the car. (*People v. Nelson* (2011) 51 Cal.4th 198, 211 [finding substantial evidence of intent necessary for attempted carjacking where defendant took an incapacitated victim's car keys but did not take the corresponding car].)

It is undisputed that defendant used force against Lorenzo W. It is also undisputed that defendant intended to and attempted to take Lorenzo W.'s Honda. Additionally, it is not disputed that defendant used force against Lorenzo W. while Lorenzo W. was attempting to regain possession of the Honda. The only question is whether this

constitutes sufficient evidence that defendant's intent to take the Honda and his use of force overlapped. We conclude that it did.

In our view, defendant's decision to grab the car keys after attacking Lorenzo W. showed a continuing intent to complete an ongoing carjacking even after the first application of force to get Lorenzo W. away from him. We agree with the People that "[t]he fact that [defendant] picked up [Lorenzo W.]'s dropped keys and continued to fight with [Lorenzo W.] provides strong circumstantial evidence of [defendant]'s continued intent to deprive [Lorenzo W.] of possession of his car." Thus, there was sufficient evidence adduced at trial from which a rational trier of fact could find defendant guilty beyond a reasonable doubt. Although the keys were from a different vehicle, there is no indication from the evidence that defendant was aware of that fact at the time he grabbed the keys and a jury could reasonably conclude that he believed they were for the same vehicle. (Cf. *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187 [one can have the requisite intent for an attempted crime "even though circumstances unknown to [the defendant] made completion of the substantive offense impossible."].)

Even if defendant did know the keys were for a different vehicle, taking these keys would have made it impossible for Lorenzo W. to pursue defendant if he got away with the Honda. Either way, the jury could have reasonably inferred from defendant's decision to take the keys that defendant intended to take Lorenzo W.'s Honda before, during, and after defendant's first use of force and the verdict is supported by substantial evidence.

B. *Remand Is Appropriate*

Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393) was enacted effective January 1, 2019. The legislation amended sections 667, subdivision (a) (§ 667(a)) and 1385, subdivision (b) (§ 1385(b)) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1 & 2.) Under the former versions of sections 667(a) and 1385(b), courts were required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony . . . ." (§ 667(a).) The court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385(b).)

In supplemental briefing, defendant claims the matter must be remanded for resentencing so the court may exercise its discretion to strike the five-year term it previously imposed based on his prior serious felony conviction.[3] The People "agree[] the new law would apply to [defendant] retroactively," but argue the case should not be remanded because the trial court clearly indicated that it would not have exercised its discretion even if it had known it had such discretion.

As a panel of this court recently determined in *People v. Garcia* (2018) 28 Cal.App.5th 961, S.B. 1393 is retroactive to judgments of conviction which are not yet

[3] The People also argued that defendant's claim is not ripe for adjudication or justiciable, because S.B. 1393 was not in effect at the time of briefing. This argument is moot, as S.B. 1393 went into effect after briefing was complete but before this opinion became final.

final as of the effective date. (*People v. Garcia*, *supra*, at p. 973 ["[U]nder the *Estrada*[**4**] rule, as applied in *Lara*[**5**] and *Francis*,[**6**] it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019."]; see *id.* at pp. 971-973.)

"'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation . . . .'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391, quoting *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Thus, where a court previously had no discretion to impose or not impose a certain sentence and now does, "the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.'" (*People v. Gutierrez*, *supra*, at p. 1391, quoting *People v. Belmontes*, *supra*, at p. 348, fn. 8.)

Indeed, under such circumstances remand is "the usual custom." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1105.) This principle has been applied in cases involving newfound discretion to strike three strikes prior convictions (*People v. Superior*

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**4** *In re Estrada* (1965) 63 Cal.2d 740.

**5** *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299.

**6** *People v. Francis* (1969) 71 Cal.2d 66.

*Court (Romero)* (1996) 13 Cal.4th 497, 531-532) and firearm enhancements (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713).

The People here point to the trial court's sentence as evidence that it would have imposed the enhancement even if it had discretion not to. The People cite the trial court's statement that there were no mitigating circumstances, the trial court's decision to impose the upper term, and its decision to have the terms for the enhancements run consecutively as clear indications of the trial court's intentions. But the trial court's sentence alone cannot provide a clear indication of its intentions. (*People v. Almanza, supra,* 24 Cal.App.5th at pp. 1110-1111 ["[S]peculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence."].)

The record only discloses one other indication of the trial court's intentions. During sentencing, the trial court stated that it had previously "made some notes of what I thought might be a fair resolution in this case. And I actually had written down 19 years during our discussions. So I think that 18 years or thereabouts is . . . what I felt this case was probably worth throughout the entire process."

While this is a clear indication that the court felt the final sentence was appropriate at the time of sentencing, it is not a clear indication that the court would not have exercised its discretion if it had been aware it had the discretion to do so. This assessment of the case was made when the court did not have the discretion to strike the prior prison term enhancement, and therefore may have been shaped by the law as it

existed at the time. Nor does the court's assessment of the case say anything about how it would analyze the enhancement under amended section 1385(b), which requires that dismissal of an enhancement be "in the furtherance of justice."

Accordingly, we find there is no clear indication that the trial court would have reached the same conclusion even if it had discretion at the time of sentencing and that remand is appropriate.

## IV. DISPOSITION

The conviction is affirmed. The matter is remanded for the trial court to consider whether to strike the prior serious felony conviction enhancement and resentence accordingly.

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FIELDS
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.